

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LEWIS, a/k/a TONY GRIGGS,

Defendant-Appellant.

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UNPUBLISHED

August 31, 2004

No. 244589

Kent Circuit Court

LC No. 01-002471-FC

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

BORRELLO, J. (*dissenting*).

Defendant in this case was denied effective assistance of counsel. Additionally, the cumulative effect of defendant's ineffective counsel coupled with the lack of African-Americans in Kent County jury pools at the time of defendant's trial, lead to the unmistakable conclusion that defendant was denied his Sixth Amendment right to a fair and impartial trial. Accordingly, I dissent from the majority's opinion.

Defendant was charged with first-degree murder that carries a mandated penalty of life in prison. Following trial, defendant was convicted of second-degree murder, carrying a concealed weapon, and felony-firearm. Defendant was sentenced to 35 to 55 years' imprisonment for second-degree murder, a concurrent term of 3 to 5 years for his CCW conviction, and a two-year consecutive sentence for his felony-firearm conviction.

This case involves a shooting death that allegedly grew out of a drug deal gone bad. There is little question that defendant was present near the scene of the shooting and that he had purchased narcotics from the victim. However, most, if not all of the witnesses called by the State against defendant were also present and most had also taken narcotics the night of the shooting. Testimony indicated that the shooter wore a mask, and one witness observed the shooter remove the mask and thereafter identified defendant as the shooter. Other witnesses testified that defendant became upset with the victim because he felt the victim had given defendant less crack cocaine than he had paid for.

After initially attempting to retain counsel, counsel was appointed by the trial court for defendant. During their second meeting,<sup>1</sup> defendant gave a list of witnesses to trial counsel. According to testimony at the *Ginther* hearing, trial counsel did not even attempt to contact or interview any of the witnesses whose names were given to her. Not only did counsel never interview any of the witnesses, she never interviewed any of the State's *res gestae* witnesses, despite the fact that the trial court awarded funds for her to retain an investigator to find and presumably interview witnesses. When asked how the investigator was used, trial counsel responded that the investigator "was never given an assignment in this case" from her.

One of the witnesses whose name defendant gave his counsel was endorsed by the State. However, at trial, defense counsel stipulated to remove the witness without either interviewing the witness or asking the State why it was not going to call the witness. Also at the *Ginther* hearing, trial counsel revealed that although police reports indicated that the identification witness requested a line-up to ensure his identification was accurate, trial counsel did not even attempt to interview him before trial.

Trial counsel often waits until preliminary examination to test the veracity and value of a witness's testimony. Had trial counsel conducted a preliminary examination in this case, perhaps there would have been *some* justification for not interviewing any witness because she would have had an opportunity to subpoena, question, and observe the witnesses in a courtroom setting. However, trial counsel did not conduct a preliminary examination in this case. When asked whether it would be particularly useful in this case to talk to witnesses before trial, trial counsel stated, "I suppose it could have been."

During trial, counsel testified that she placed a law clerk between she and defendant. Counsel offered varying reasons for undertaking such action. First she testified that defendant was asking too many questions and later testified that defendant was becoming quite angry with her. When defense counsel distance themselves from their client in view of the jury, it sends a clear visual message to the jury. At the very least, by the time counsel felt compelled to literally distance herself from her client, there had been a breakdown of the attorney-client relationship such that counsel should have sought permission from the trial court to recuse herself from further representation of defendant.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts and then decide whether those facts establish a violation of the defendant's constitutional right to effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). We review a trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001).

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<sup>1</sup> At the *Ginther* [*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)] hearing, trial counsel testified that her first meeting with defendant was just to review the charges, or so she thought. Trial counsel's lack of memory during the *Ginther* hearing further underscores the cavalier attitude counsel took toward this case and her client. Counsel admitted that she likely only had three meetings with defendant before trial.

Our Supreme Court recently decided in *People v Grant*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 119500, decided July 15, 2004) that “[a]lthough we must defer to the trial court’s findings made at the hearing held pursuant to *People v Ginther* 390 Mich 436; 212 NW2d 922 (1973), we do not afford blind deference when the trial court applies the wrong legal standard.” Slip op 8 n 5. In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted the ineffective assistance of counsel standard that the United States Supreme Court established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Therefore, to demonstrate ineffective assistance, a defendant must show that his attorney’s performance fell below an objective standard of reasonableness. The defendant must overcome the presumption that the challenged action could have been sound trial strategy. *Id.* at 689; see also *People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996). A reviewing court must not evaluate counsel’s decisions with the benefit of hindsight. *Strickland, supra* at 689. On the other hand, the court must ensure that counsel’s actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution. *Grant, supra* at slip op 9. Typically, a defendant must show a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *People v Poole*, 218 Mich App 702, 708; 555 NW2d 485 (1996). Here, where defense counsel failed to interview all potential witnesses, it is impossible for this Court to decide whether the result would have been different. Because we do not know what defendant’s proposed witnesses would have testified to, we cannot, with any degree of certainty, speculate about the likely result had defense counsel actually called, or at least interviewed, defendant’s proposed witnesses.

Following the *Ginther* hearing, the trial court in this case rejected the claim of ineffective assistance of counsel by stating:

It’s this Court’s opinion from presiding over this trial . . . that [defense counsel] did provide effective representation of Mr. Lewis. It’s this Court’s opinion that she did an excellent job . . . I’m convinced that the result in this trial would not have been any different had any of these things been done that the defense here is suggesting should have been done . . . he [the defendant] was acquitted of first-degree murder and — convicted of second-degree murder, which is a significant benefit to the Defendant.

As our Supreme Court stated in *Grant*, “A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make ‘an independent examination of the facts, circumstances, pleadings and laws involved . . . .’” *Grant, supra* at slip op 11, quoting *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed. 309 (1948). This includes pursuing “‘all leads relevant to the merits of the case.’” *Id.*, quoting *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). In *Grant*, our Supreme Court further held,

Defendant’s counsel failed to adequately interview members of the family who were present on the day of the incident. He did not determine if in fact the alleged bicycle accident had caused the older girl’s injury. On the basis of well-established law, we hold that counsel’s failure to investigate and substantiate defendant’s primary defense was not a strategic decision, erroneous only in hindsight. It was a fundamental abdication of his duty to conduct a complete investigation, and it restricted his ability to make reasonable professional

judgments and put forth his case. As a consequence, defendant was deprived of a substantial defense and of the effective assistance of counsel. [*Id.* at slip op 1-2.]

Unlike this case, in *Grant*, defense counsel interviewed some of the witnesses. In the present case, defense counsel failed to interview or attempt to interview any of the witnesses defendant told her about. She also failed to interview any of the State's *res gestae* witnesses. Moreover, she agreed to allow the State not to call a witness identified by defendant as someone who had potential exculpatory evidence. Defense counsel failed to conduct a preliminary examination that would have afforded her an opportunity to at least examine the State's witnesses before trial. Last, during trial, defense counsel placed another person between herself and defendant, first claiming that defendant was asking too many questions, and later claiming that defendant was angry with her.

Defense counsel in this case did virtually nothing to prepare for a capital case. Failing to interview witnesses and failing to conduct a preliminary examination cannot by any stretch of the judicial imagination be attributed to trial strategy. Allowing the State to bypass calling a *res gestae* witness listed by her client can likewise not be attributed to trial strategy. In my opinion, the trial court clearly erred when it failed to give due weight to any of these factors in deciding that defendant was not deprived of effective assistance of counsel. Pursuant to our Supreme Court ruling in *Grant*, *supra*, and other well-settled law, defendant was denied effective assistance of counsel.

On this basis alone, I would reverse defendant's conviction and remand the matter for new trial with new defense counsel. However, there are additional factors in this case which justify the same result.

Kent County selected its jurors with a faulty software program that inexplicably left out of the selection process zip codes with high minority populations. See *People v Bryant*, unpublished per curiam opinion of the Court of Appeals, issued March 16, 2004 (Docket No. 241442). That faulty system was in place at the time of this trial, leading the trial court to conclude, in response to defendant's appellate counsel, that there was likely an underrepresentation of African-Americans in defendant's jury array. In fact, the record reveals that when defendant's jury was selected, the entire jury pool contained only one African-American juror.

Given defense counsel's inattentive approach to her client and this case, it comes as no surprise that she would fail to object to the jury array. Consequently, defense counsel stated that she was satisfied with the jury array. Accordingly, the prosecution argues that as unpreserved constitutional error, we review the record for plain error that affects the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). I agree with plaintiff that there is an insufficient record in this case from which we may draw a conclusion that defendant was denied his Sixth Amendment right to a fair and impartial jury predicated solely on the number of black jurors.<sup>2</sup>

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<sup>2</sup> I concur with plaintiff on this issue only to the extent that there is no record from which this Court may adjudicate this issue. Yet I also agree with defendant's argument that *Amadeo v Zant*,  
(continued...)

The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (On Remand)*, 211 Mich App 30, 34; 535 NW2d 518 (1995). To reverse on the ground of cumulative error, the errors at issue must be of consequence. *Cooper, supra* at 659-660. In other words, the effect of the errors must have been seriously prejudicial to warrant a finding that defendant was denied a fair trial. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Accordingly, I find that the cumulative errors that arose as a result of defense counsel's ineffective assistance, coupled with Kent County's exclusion of minorities from jury pools, taken together, denied defendant a fair trial.

I would therefore reverse defendant's convictions and remand the matter for new trial.

/s/ Stephen L. Borrello

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(...continued)

486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988), applies to the preservation issue.